Malaysian Assurance Alliance Berhad v Jong Sis Fan (f) & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–53 OF 2002-II
LAU BEE LAN JC
12 APRIL 2004

Insurance Law — Life insurance — Award of interest — Dispute over award of interest on insurance policy — Whether death accidental or suicide — Distinction between basic death benefit policy and accidental death benefit policy — Whether evidence to be seen in the light of other evidence adduced

The appellant/defendant ('appellant') lodged an appeal against the decision of the learned sessions court judge made on 22 November 2002 wherein the court, inter alia, ordered that the appellant do pay the first and second plaintiffs the sum of RM100,000 with interest therein at the rate of 8% per annum from the date of judgment till date of realisation. The respondents/plaintiffs ('the respondents') have in turn filed a cross-appeal against the award of interests. The issue revolved on the question whether or not the accused die of suicide.

Held, dismissing the appeal and cross-appeal with costs:

(1) The correct approach was to make a distinction between a situation where the benefit in dispute is the basic death benefit of the policy and a situation where the benefit in dispute is an accidental death insurance benefit. If it is the former situation, no proof need be adduced by the proponent of accidental death other than occurrence of the death itself since death by accident is taken as an axiomatic truth but liable to rebuttal. It follows that clear and cogent rebuttal evidence is required to tip the balance of probabilities sufficiently to justify a finding of suicide (see para 6).

(2) The fact that the deceased insured took unidentified poison through his mouth constituted sufficient proof that he intended to commit suicide. It has to be seen in the light of other evidence adduced (see para 8).

(3) The criticism of the learned counsel for the appellant of the learned trial Judge's reference to *Still v Metropolitan Life Insurance Co* 165 SE 2d 8% (Ga 20 Court Appeal 1968) was devoid of merit. The learned trial Judge had cited *Still's* case to contrast and illustrate the absence of motive and evidence of suicide in the instant case (see para 11).

(4) The evidence of the Dr Kirankumar ('DW2') was inherently defective as he was 'not very sure' of what the stomach contents were and therefore had to confirm the cause of death from a toxicologist and there was evidence that he had reserved the cause of death in the post

mortem report pending the report of chemical analysis of blood and stomach content. DW2 also did likewise with respect to the medical certificate of cause of death and was also shown to have misunderstood the terms 'common drugs' used by government chemist ('PW1'). The learned trial Judge had considered the inherent weaknesses in DW2's evidence vis-a-vis chemist's evidence and then came to a proper inference (see para 23).

(5) In respect of the cross-appeal, having given due consideration to the submissions of both the learned counsel and the cases cited in support, the learned trial Judge did not err in the exercise of her discretion and the cross-appeal was dismissed with costs (see para 25).

[**Bahasa Malaysia summary**

Perayu/defendan ('perayu') telah membuat rayuan terhadap keputusan Hakim Mahkamah Sesyen yang dibuat pada 22 November 2002 dimana mahkamah, antara lainnya, telah memerintahkan perayu untuk membayar plaintif pertama dan kedua sejumlah RM100,000 berserta faedah dengan kadar 8% setahun bermula dari tarikh keputusan sehingga tarikh penyelesaian. Responden/plaintif ('responden') sebaliknya memfailkan rayuan balas terhadap award faedah. Isu adalah berkisar kepada soalan sama ada tertuduh mati kerana membunuh diri.

Diputuskan, menolak rayuan dan rayuan balas dengan kos:

(1) Pendekatan yang betul adalah dengan membuat perbezaan di antara situasi di mana faedah yang dipertikaikan adalah polisi bagi faedah kematian biasa dan situasi di mana faedah yang dipertikaikan adalah faedah insurans kematian yang tidak disengajakan. Di dalam situasi yang terdahulu, tiada bukti yang perlu dikemukakan oleh penyokong kematian yang tidak disengajakan selain daripada berlakunya kematian tersebut oleh kerana kematian yang tidak disengajakan merupakan kebenaran yang nyata tetapi boleh disangkal. Justeru itu keterangan jelas dan nyata dan tidak boleh disangkal diperlukan untuk memberikan kelebihan keseimbangan kebarangkalian yang mencukupi untuk menjustifikasikan penemuan bunuh diri (lihat perenggan 6).

(2) Fakta bahawa si mati mengambil racun yang tidak dikenali melalui mulutnya menjadikan bukti yang cukup bahawa beliau ingin untuk membunuh diri. Ianya perlu dilihat berdasarkan keterangan lain yang dikemukakan (lihat perenggan 8).

(3) Kritikan peguam perayu yang bijaksana ke atas rujukan hakim yang bijaksana kepada *Still v Metropolitan Life Insurance Co* 165 S.E. 2d 8% (Ga 20 Court Appeal 1968) adalah tidak mempunyai merit. Hakim yang

bijaksana telah menyebut kes *Still* untuk membandingkan dan menunjukkan ketiadaan motif dan keterangan bunuh diri di dalam kes ini (lihat perenggan 11).

(4) Keterangan Dr Kirankumar ('SD2') adalah defektif kerana beliau 'tidak berapa pasti' apakan kandungan di dalam perut dan oleh itu terpaksa mendapatkan kepastian sebab kematian daripada ahli toksikologi dan terdapat juga keterangan bahawa beliau telah menangguhkan sebab kematian di dalam laporan bedah siasat sehingga laporan analisis kimia darah dan kandungan perut. SD2 juga melakukan perkara yang sama mengenai sijil perubatan sebab kematian dan juga menunjukkan silap faham terma 'dadah biasa' yang digunakan oleh ahli kimia kerajaan ('AKK'). Hakim yang bijaksana telah menimbangkan kelemahan-kelemahan yang sedia ada di dalam keterangan SD2 vis-à-vis keterangan ahli kimia dan telah membuat inferens yang wajar (lihat perenggan 23).

(5) Berkenaan rayuan balas, setelah menimbangkan hujah-hujah kedua-kedua peguam yang bijaksana dan kes-kes yang berkaitan, hakim yang bijaksana tidak melakukan kesilapan di dalam budi bicara dan rayuan balas ditolak dengan kos (lihat perenggan 25).]

Cases referred to

Clark v NZI Life Ltd [1991] 2 Qd R (refd)
Ex parte Brandon In re Trench (1884) 25 Ch D 500 (refd)
Frances VV Horton v Reliance Standard Life Insurance Company (US Court of Appeal Eleventh Circuit) (refd)
Greening v Commercial Union Assurance (1987) 29 20 CCLI 129 (refd)
Mafabhai Nagarbhai Raval v State of Gujarat [1992] AIR Supreme Court 2186 (refd)
R v Her Majesty's Coroner for the County of Survey ex p Rosalind Ager QBD (Coroner's Law Resource) (refd)
R v Huntbash, ex parte Lockley [1944] KB 606 (folld)
Re Cohen, ex p Bankrupt v Inland Revenue Commissioners & Anor [1950] 2 All ER 36 (refd)
Re Derek Selby Deed [1971] 2 MLJ 277 (refd)
Saxlehner v Apollinaris Company [1897] 1 Ch 893 (refd)
Southall v Cheshire Country News Co Ltd 5 B. WCC 251 (folld)
Spiratos v Australasian United Steam Navigation Co Ltd [1955] 93 CLR 317 (refd)
Still v Metropolitan Life Insurance Co 165 SE 2d 8% (Ga 20 Court Appeal 1968 (refd)
The Unitas [1950] 2 All ER 219 (refd)
Valerie Jean Beischel v Mutual of Omaha Insurance Company [1991] Carswell Alta 139 (Canada) (refd)

Frank Tang (Tang & Partners) for the appellant
Albert Tang (Chew, Jugah, Wan Ullok & Co) for the respondents

Lau Bee Lan JC:

[1] This is an appeal lodged by the appellant-defendant ('the appellant') against the learned sessions court judge's decision made on 22 November 2002 wherein the Court, inter alia, ordered that the Defendant do pay the first and second Plaintiffs the sum of RM100,000 with interest therein at the rate of 8% p a from the date of judgment till date of realisation.

[2] The respondents-plaintiffs ('the respondents') have in turn filed a cross-appeal against the award of interests.

[3] As has been pointed out in the court below the issue then and in turn the appeal before me revolves on the question of, did the Accused die of suicide?

[4] The court has considered the submissions of both the learned Counsel for the appellant and respondents, Mr Frank Tang and Mr Albert Tang respectively, and the court's findings and evaluation include the following:

Grounds 1. 5.6 and 7 of the Memorandum of Appeal

[5] I am of the view that the learned trial Judge had applied the correct test ie of taking into consideration the presumption against suicide. This is evident in a host of cases including the cases of *Valerie Jean Beischel v Mutual of Omaha Insurance Company* [1991] Carswell Alta 139 (Canada); *Clark v NZI Life Ltd* [1991] 2 Qd R; *Frances VV Horton v Reliance Standard Life Insurance Company* (US Court of Appeal Eleventh Circuit); *R v Her Majesty's Coroner for the County of Survey ex p Rosalind Ager QBD* (Coroner's Law Resource); and *Re Derek Selby Deed* [1971] 2 MLJ 277.

[6] The correct approach to the issue is to make a distinction between a situation where the benefit in dispute is the basic death benefit of the policy and a situation where the benefit in dispute is an accidental death insurance benefit (p 16 of *Beischel's* case. If it is the former situation, 'no proof need be adduced by the proponent of accidental death other than occurrence of the death itself since death by accident is taken as an axiomatic truth but liable to rebuttal. It follows that clear and cogent rebuttal evidence is required to tip the balance of probabilities sufficiently to justify a finding of suicide' as per Marshall J in *Greening v Commercial Union Assurance* (1987) 29 20 CCLI 129.

[7] Mason J in *Beischel's* case held the view that the same reasoning in the case of the latter situation applied by stating:

> I find that the plaintiff has the onus to establish upon the balance of probabilities that her husband died accidentally. In cases such as this where the circumstances surrounding the death are questionable and suicide is the only real alternative to accidental death, the presumption against suicide will establish death by accident on a balance of probabilities unless the defendant can by cogent evidence establish the probability of suicide. The degree of probability for the defendant is commensurate with the seriousness of the allegation of suicide as stated by the

Supreme Court of Canada in *Hanes v Wawanesa Mutual Insurance Co* [1963] SCR 154, [1963] 1 CCC 321, 36 DLR (2d) 719.

The standard of proof in determining the said issue is on a balance of probabilities which was what the learned trial Judge in the present case applied.

[8] Question is what cogent rebuttal evidence has the appellant insurer adduced? Does the fact that the deceased insured took unidentified poison through his mouth constitute sufficient proof that he intended to commit suicide (Ground 1). It has to be seen in the light of other evidence adduced.

Grounds 3 and 4 of the Memorandum of Appeal

[9] The learned trial Judge did not err that the appellant has to prove motive on the part of the insured for ending his life. This is the legal position in view of the legal presumption against suicide and this is a factor considered in a host of cases like *Beischel's* case at p 15, para 38 and para 80, *Clark's* case [1991] 2 Qd.R at p 18 para 14, 40 to 45; and *Spiratos v Australasian United Steam Navigation Co Ltd* [1955] 93 CLR 317 at page 23 para 125 to 126.

[10] Further, the learned authors of the book entitled '*Insurance Law in Australia and New Zealand* 1975 at p 38 have opined:

On this question evidence may be admitted in order to show that there was a motive for suicide. The object of such evidence is to rebut the natural presumption that a sane person does not commit suicide and enable the Court or jury, in weighing the evidence pointing to suicide, to determine whether there is any inducement to form such an intention.

Evidence of motive assists the insurer in sustaining the onus of proving by a preponderance of evidence that the insured committed suicide.

[11] I find the criticism of the learned counsel for the appellant of the learned trial Judge's reference to *Still v Metropolitan Life Insurance Co* 165 SE 2d 8% (Ga 20 Court Appeal 1968) is devoid of merit. With due respect to the learned counsel, the learned trial Judge had cited *Still's* case to contrast and illustrate the absence of motive and evidence of suicide in the instant case (see line 26, p 41 to line 12, p 42 Record of Appeal ('ROA')).

[12] It is true that *Re Derek Selby Deed* [1971] 2 MLJ 277 pertains to a coroner's inquest regarding the death of one Derek Selby where the magistrate recorded a finding of suicide against which the deceased's wife filed a revision petition. Nevertheless, in my view, it is relevant in the sense that in the learned judge's judgment, His Lordship Sharma J at pp 279–280 had referred to the English cases of *R v Huntbash, ex parte Lockley* [1944] KB 606 and *Southall v Cheshire Country News Co Ltd* 5 B WCC 251 where the Court of Appeal held, inter alia, 'suicide is never to be presumed' and His Lordship had similarly held that, 'The law is that suicide is not to be presumed.' I share the sentiment so expressed.

[13] The appellant has also contended vide ground 4 that the learned trial Judge erred in law in failing to appreciate that in a civil case, where the intention of a person is relevant, he is presumed to have intended the natural consequences of his acts and further erred both in fact and law by failing to consider that when the deceased insured took the unidentified poison with a strong chemical smell through his mouth, he must have intended the natural consequences of his action.

[14] In support learned counsel for the appellant cited *Halsbury's Laws of England* (4th Ed, Vol. 25) para 114 which it states 'Where, in a civil case, the intention of a person is relevant, he is presumed to have intended the natural consequences of his acts.' The cases referred to in footnote 8 of the aforesaid proposition of law are:

(1) *Ex parte Brandon In re Trench* (1884) 25 Ch D 500 and *Re Cohen, ex p Bankrupt v Inland Revenue Commissioners & Anor* [1950] 2 All ER 36;

(2) *Saxlehner v Apollinaris Company* [1897] 1 Ch 893; and

(3) *The Unitas* [1950] 2 All ER 219.

[15] I agree as submitted by the learned counsel for the respondents that these cases are irrelevant for purposes of this instant case.

[16] With respect to the contention that the learned trial Judge to appreciate the significance of the evidence of the Chemist (PW1) that the tests conducted by him were not conclusive because if the pesticides did not contain Chloro & phosphate compounds then the chemicals would not be detected by the tests he conducted and that instrument 'GCMSD' used by him will only detect 'a few hundred thousand' chemicals stored in its library/ data base. (Ground 5). Further, the Appellant contends that there was a failure to give any or sufficient weight to the evidence of Dr. Kirankurnar (DW2) and the IO Sgt Major Lini Satong (D.W.3) that there was a strong smell of chemical from the mouth and the contents of the stomach of the deceased during post-mortem (Ground 6).

[17] To determine if there are merits in these contentions, it would be necessary to consider the evidence of Dr Kirankumar and the chemist. Dr Kirankumar testified during cross-examination, *'Organo-phosphorus is the group of chemical in respect of insecticide, pesticide ... I was 100% sure that there was a chemical smell. Probably it was insecticide.* I queried insecticide because it was most commonly used'. He further testified during re-examination, 'Because of the strong smell in the stomach I was sure that it was a chemical ... *I am not able to decide in this case if the smell was from insecticide or organo-phosphorus'.*

[18] Since Dr Kirankumar was uncertain 'if the smell was from insecticide or organo-phosphorus' which he said 'is the group of chemical in respect of insecticide, pesticide' and he was unable to ascertain the cause of death, (to be discussed later) the court can only look to the chemist.

[19] The chemist in examination-in-chief testified, 'In agriculture, poison used would be pesticides ie organo chloro and organo phosphate. The test I did covers chloro and phosphate but if the pesticide does not contain chloro and phosphate then these chemicals will not be sorted out'. In cross-examination, the chemist stated that he did not know of any pesticides that do not chloro or phosphate. The chemist under cross-examination also said, 'I only make a finding based on standard test. Smell alone can provide a guideline but to be conclusive, one need to use the standard test'. The standard test based on the evidence of the chemist and alluded to in the judgment of the trial judge comprises three methods of UV screening, thin layer chromatogram and GCMSD.

[20] In the light of the evidence underscored above, I respectfully disagree with the contention of the learned counsel. Dr Kirankumar had alluded to organo-phosophorus which was covered in the test conducted by the chemist.

[21] The chemist report at p 169 of the agreed bundle of documents have certified that on analysis, no common drugs were found in the blood and stomach content samples and no ethyl alcohol was found in the blood sample.

Ground 2 of the Memorandum of Appeal

[22] The appellant contends that the learned trial Judge had erred in law and in fact in disregarding Dr Kirankumar's (D.W.2) opinion on the cause of the death of the deceased insured and in subsituting the same with her own opinion. In support the case of *Mafabhai Nagarbhai Raval v State of Gujarat* [1992] AIR Supreme Court 2186 was cited which can be distinguished as it concerns the weight of a dying declaration made to a doctor.

[23] Here, in the case before the court, the evidence of DW2 is inherently defective as he had stated that he was 'not very sure' of what the stomach contents were and therefore had to confirm the cause of death from a toxicologist and there is evidence that he had reserved the cause of death in the post mortem report pending the report of chemical analysis of blood and stomach content being done which in this case was sent to a government chemist, PW1 whose evidence had been accepted in Court on numerous occasions. DW2 did likewise with respect to Form IX—the medical certificate of cause of death. DW2 is also shown to have misunderstood the terms 'common drugs' used by PW1. The learned trial judge had considered the inherent weaknesses in DW2's evidence vis-a-vis PWl's evidence and then came to a proper inference.

[24] In the light of the foregoing reasons, the appeal is dismissed with costs.

Cross-Appeal

[25] In respect of the cross-appeal, having given due consideration to the submissions of both the learned counsel and the cases cited in support, I find the learned trial Judge did not err in the exercise of her discretion and the cross-appeal is dismissed with costs.

Order accordingly.

Reported by Mohd Nizam Hamdan